No. 74-712

Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP L. BORNSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, PHILIP L. BORNSTEIN

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QUESTIONS PRESENTED

I. Whether a subcontractor under the False Claims Act is responsible for multiple forfeitures arising out of unilateral and unanticipated acts of his contractor with respect to claims for payment under a government contract?

A. Whether a subcontractor under the forfeiture provisions of the False Claims Act can be held liable for incidents that occur subsequent to his own acts?

B. Whether the False Claims Act contains a policy which is intended to maximize the forfeitures assessed against the subcontractor?

II. Whether the double damage provision of the False Claims Act provides for the crediting first to the subcontractor of recovery made by the United States from the prime contractor,to be followed by the doubling feature?

STATUTE INVOLVED

Respondent Bornstein adopts herein, by reference, the argument presented to this Court by Respondent Page. To repeat would be superfluous. It should be noted only that the government failed to include in its presentation of the "Statute Involved" the entire history of the False Claims Act, 12 Stat. 696, 698, as expressed in 31 U.S.C. Sec. 231.See(Pet.Brief, p. 2); United States v. Neifert-White Co., 390 U.S. 228, 229, n.1.

STATEMENT

Respondent Bornstein, again, adopts herein by reference the arguments outlined in the Statement in the Brief of Respondent Page. The following are additional facts which have been omitted by the government or have been insufficiently explained.

It is incorrect to assert that these tubes "had not been inspected." (Pet. Brief, p. 4) Although respondents acknowledge responsibility for failure to follow "JAN" requirements, they did, in fact, submit the tubes for inspection to Saxon Laboratories, Inc., and the results affirmed "the tubes were ... operable". (App. p. 47; Stip. 17(k),(l)) There is no proof the quality of the tubes was inadequate for the uses intended.

The nature of the contract at issue is described as follows: "... Model undertook to manufacture for and supply to the Department of the Army Radio Kit Sets, each of which was to contain the following sub-items: A radio transmitter kit, a radio receiver kit, a power supply kit, a radio transformer kit, a radio receiver

kit, and a radio accessory kit. The total dollar volume of the contract and its supplements was $2,096,583.08. (Emphasis added) (Stip. 7, App., p. 39) Each accessory kit contained two of the tubes at issue herein. Therefore, respondents' contribution to the entire contract was a fraction of the total contract, both in terms of materials and costs. Indeed, respondents received a total of $12,704.00. (Pet. App. C, pp.24A 25A) This is pointed out to re-emphasize that respondents did not, and could not, cause the submission of 35 invoices by the contractor to the United States.

The government's brief erroneously states, at page 4, that "The Army ... expended $16,205.54 to replace (the) tubes..." The citation for this assertion is in error. Petitioner failed totally to provide any such proof. (Pet. App. C, p. 26A; App. p. 107, 108). All that

one might possibly assert, from the government's aforesaid "proof", with respect to replacement cost, is a figure of $3,918.72. (App., p. 109) The government's figure of a $16,205.54 loss is, therefore, pure speculation.

The history of the government's forfeiture and damage claims against respondents is an interesting study in constradictions, leading to the conclusion that the government was never clear as to its own position: The Complaint, filed January 6, 1967, states damages were $18,042.44. The acts upon which forfeitures are claimed are not detailed. (App., p. 11) Unfortunately, the government did not make the pre-trial order a part of the record. However, we see in the Stipulation of Facts, on April 13, 1973, for the first time, a claim for 38 forfeitures. Only

three of these relates to acts of respondents. (App., p. 50). And as to these three, no court has sustained the government's claims; nor has the government appealed from these unfavorable determinations. This leaves 35 forfeitures based solely on actions of the contractor and not respondents. The Circuit Court below narrates the government's position as follows:

> "In the district court the government asserted at one time 38 forfeitures: one for each of the 35 Model invoices, one for the false branding of 397 tubes, one for affixing the facsimile 'Eagle' stamp on 21 packing lists and one for the issuance of 21 false Certificates of Compliance. At an earlier time it asserted 30 for-

feitures in the mistaken belief that there were 30 invoices from United to Model rather than three. On Appeal the government is satisfied with 35 forfeitures." (Pet. App. A, p. 9A).

SUMMARY OF ARGUMENT

I

FORFEITURES

A review of the cases which have interpreted the forfeiture section of the False Claims Act has not turned up one which supports the government's rationale in this appeal. Not one case has maximized, or multiplied, the acts of the subcontractor. Not even the cases relied upon most heavily by the government support its harsh and extensive claims in this appeal. See United States v. Neifert White Co.,

390 U.S. 228 and United States v Ueber, 299 F 2d 310. The courts have given different reasons and explanations, but they have, without exception, made findings which invariably have reduced, or minimized, the acts of the subcontractor. Also see United States ex rel. Marcus v Hess, 317 U.S. 537. There are probably many reasons for this moderate approach. A few might include the following, which apply herein: there is a criminal penalty which is an adequate, and proper deterrent; the subcontractor often has only a small part of the total contract with the United States; it is inherently unjust to fix the blame on one subcontractor who is not factually responsible for the arbitrary acts of another (contractor); it is equally unjust and unfair to hold one (subcontractor) at fault for acts of another (contractor) which the former

cannot anticipate or intend.

It would appear the Circuit Court below was troubled by the gross inequity of holding the subcontractor liable for "the fortuity of the number of invoices submitted by the main contractor". (Pet. App. A, p. 17A) Deterrence should be left to the criminal statute. See 18 U.S.C. 287 and 1001. There is no historic or policy basis to the government claim that multiple civil penalties are justified to deter respondents.

II

DOUBLE DAMAGES

The government's brief does not cite one circuit court opinion which supports its attempt to obtain double damages without first giving credit for compensation received. (Pet. Brief, pp. 10, 11 and 26 to 30). The government's reliance is upon a totally

inapplicable tort concept which holds a tortfeasor should not be credited with compensation received from a collateral source. Here, the government acknowledges receipt of $18,000.00 from the contractor. (Stip. 17 (q), Pet. App. p. 47) Although this tort oriented rationale should be rejected, it still cannot fairly be argued that the contractor in this transaction was a "collateral source."

Both the district and circuit courts below found no merit in Petitioner's efforts to develop a new double damages concept, which is not founded on the cases or public policy.

The government also has changed its position with respect to the double damage claim. In the courts below, it argued there should be a total rejection of any credit for payment made by Model, the contractor. The Circuit Court described the government's position as

"disingenuous". (Pet. App. A, p. 5A) The government's present formula is stated in Petitioner's Brief, at pages 28 and 29. It now does belatedly acknowledge there should be a credit with respect to the $18,000.00 payment by the contractor to the United States.

ARGUMENT

I

UNDER THE FALSE CLAIMS ACT A SUBCONTRACTOR IS NOT RESPONSIBLE FOR MULTIPLE FORFEITURES ARISING OUT OF UNILATERAL AND UNANTICIPATED ACTS OF HIS CONTRACTOR WITH RESPECT TO CLAIMS FOR PAYMENT UNDER A GOVERNMENT CONTRACT

The government's attempt at a broad and loose construction of the civil penalties under 31 U.S.C., Sec. 231 is contrary to this Court's past holdings. See United States v. McNinch, 356 U.S. 595. This case suggests the False Claims Act should be interpreted in a manner far different from that adopted by the government in the instant matter. In McNinch, supra, at page 598, the Court stated:

> "But it must be kept in mind, as we explained in Rainwater (supra), that in determining the meaning of the words 'claim against the Government' we are actually construing

> the provisions of a criminal statute. Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions."

The major thrust of the government's argument is that its claims with respect to 35 forfeitures and a formula of double damages are necessary to compensate the United States and deter this and other respondents who would violate the False Claims Act. (Pet. Brief, at pp. 8, 11, 19, 29, 30) This conclusion arises out of a confusion between the criminal punishment of section 5438 and the civil penalties of section 3490. (Pet. App. A, p. 10A)

The purpose of the civil portion of the Claims Act is stated by Justice Black in Hess at page 331, as follows:

> "We think the chief purpose of the statutes here was to provide for restitution to the government of

> money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. This conclusion is consistent with a statement made immediately before final passage of the bill. A Senator discussing these sections said: 'The government ought to have the privilege of coming upon him (a fraudulent contractor) or his estate and his heirs and recovering the money of which it is defrauded.' The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress."

Again, in Hess, supra, at 549, the court properly distinquished between civil and criminal penalties, as follows:

> "It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction. The statutes on which this suit rests, make elaborate provision both for a criminal punishment and a civil remedy. Violators of §5438 may 'be imprisioned at hard labor for not less than one or more than five years, or fined not less than one thousand nor more than five thousand dollars.' We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it".

A. LIABILITY FOR EACH $2,000 FORFEITURE UNDER THE FALSE CLAIMS ACT DEPENDS UPON "LOCALIZING THE INCIDENCE OF FRAUD" AND "INDIVIDUALIZED ACTS."

The government's brief states no logical difference exists between liability for forfeitures of a contractor and that of a subcontractor, under the False Claims Act. (Pet. Brief, pp. 13-15) Privity between sub-contractor and the United States is clearly not a legal issue. However, a lack of privity does make it necessary to examine carefully the acts of the subcontractor whose conduct is entirely independent of the contractor. The only case in this Court to analyze the question of multiple forfeitures supports respondents' contentions. In United States ex rel. Marcus v. Hess, supra, 317 U. S. 537, at 544 and 545,

this Court noted that the Government had contended in the trial court that a $2,000.00 forfeiture should be exacted for each and every form submitted by the defendants in the sourse of their enterprise. The trial court had limited the number of forfeitures to one for each separate project involved, the case involving false claims submitted in connection with various P.W.A. projects. The Court concluded that this decision was proper and that the "incidence of the fraud on each additional project is as clearly individualized as is the theft of mail from separate bags in a post office. (317 U.S. at 552). At page 549, the Hess Court said: "It is, of course, well accepted that for one act, a person may be liable to pay damages and to suffer a criminal penalty. Long ago, this Court said, 'A man may be compelled to

make reparations in damages ... and be liable for a breach of the public peace, in consequence of the same act'". The reference here is to the propriety of civil sanctions following criminal penalties. But the point of the Court's argument is also that there can be no civil sanction without an act.

In this case the respondents committed three acts which involved three shipments of the tubes in question to Model. It was entirely fortuitous that Model, in turn, then submitted 35 invoices to the United States under the entire two million dollar contract. Again, payment was made by means of eight vouchers which was entirely unrelated to the acts of respondents. Respondents did not commit 35 acts. Nor is there any rational basis to argue that respondents "caused" Model to file 35 false claims. Such a position

is not supported by the Hess rationale. The number of separate projects in Hess provided a form of limitation to the number of false claims which the Court recognized, even though the defendants in Hess had submitted many more documents than there were projects.

Similarly in United States vs. Rohleder, 154 F. 2d., 130, 131 (C.A. 3d 1946) (referred to below, 361 F. Supp. at 878, 879) the Court relied on the above holding in the Hess decision to limit, not expand, the number of forfeitures. In the Rohleder case there were 16 contracts involved and the trial court had assessed the $2,000.00 forfeiture for each of the 16 contracts. The government cross-appealed claiming that each of the 90 purchase orders called for a separate forfeiture. The government tried to distinguish the Hess case on the ground that in the Hess case the fraud was

in the procurement of the contracts whereas in the Rohleder case the fraud arose from the means taken to obtain the approval of the supervisor of ship-building for each of 90 purchase orders. The Court stated that the difference exists, but is not significant because the purchase orders were part of the contracts and not definite projects in themselves. Analogizing between Rohleder and the case at bar, there was but one contract between Model and the plaintiff: the invoices submitted by Model, the vouchers paid by the government and the 3 shipments with accompanying invoices made by the defendants were all part of this one contract. Based on the Rohleder analysis, one concludes there can be but one forfeiture, not 35.

The government grounds its claims on the following argument: "The focus of the Act is upon the presentation of false claims, not upon the existence of contractual relations." (Pet. Brief,p. 8) It's authority for this position is United States v. Neifert-White Co., 390 U.S. 228, 233. A careful reading, by the undersigned, of Neifert-White Co., reveals no such language, either express or implied. Rather the issue was the scope and meaning of the word "claim." As stated by the Court, "The question is wether the Act applies to the supplying of false information in support of an application ..." (Neifert-White Co., supra, p. 229) Respondents readily can agree with the Neifert-White Co. holding and disagree vehemently with the government's reading of the same. The latter decision does not support the implication that, somehow, a subcontractor is completely liable for the independent acts

of the contractor.

Respondent Bornstein does not limit his argument to the imposition of one forfeiture based on one contract. But he does contend that he should not be held liable for forfeitures that exceed his individual acts. Those individual acts are three in number. (App., p. 48)

B. THE CASES AND THE ACT'S POLICY AND INTENT DO NOT SUPPORT THE MAXIMIZATION AND MULTIPLICATION OF FORFEITURES ASSESSED AGAINST THE SUB-CONTRACTOR.

The heart of the government's contention with respect to a multiplication of forfeitures depends upon its analysis of United States v. Ueber, 229 F 2d 310.

In Ueber, the defendant was charged with making false claims as a sub-contractor to a prime contractor (with the United States) which held a cost-

plus-fixed-fee contract with the United States. The defendant sub-contractor, in turn, held "time and material" contracts with the prime contractor. The defendant sub-contractor presented 422 invoices to the prime contractor each of which contained false claims. Each of the 422 false invoices submitted by the defendant resulted in an increased claim being presented to the United States. In spite of this the Court affirmed the finding of the trial court limiting the forfeitures to one for each of the 54 vouchers presented to the United States by the prime contractor.

No matter what rationale is employed it is indisputable that the Ueber court reduced and did not maximize the number of claims, which was consistent with a reasonable approach to the statute

and the particular circumstances therein. As has been pointed out by all the parties herein, and the courts below, the government's interpretation of the False Claims Act could lead to the most inequitable penalties being imposed. (Pet. App. A,P.16A)

None of the cases thus far reported support the government's position herein with respect to 35 forfeitures. In seemingly every instance the number of claims made by a contractor was used to limit, rather than multiply, the number of forfeitures. Not one case has been cited which holds a subcontractor responsible for the acts of the prime contractor, which multiply the number of claims.

What follows immediately below is a discussion of several of the cases cited by the government to support its contentions.

Whenever the number of claims made by a contractor was used to determine the number of forfeitures charged against a sub-contractor, the former number was utilized only to limit the total number of forfeitures, and not to expand it. None of the cases hold a sub-contractor responsible for the acts of a prime contractor and which multiply the number of claims against the former.

In United States v. Gardner 73 F Supp. 644 (N.D. Ala. 1947) the defendants were cited for making false claims in overcharging of butane gas to certain housing projects of the Federal Housing Authority. Clearly there were a great many such shipments but the number of forfeitures was limited to one for each of the 9 quarters in which quarterly reports were issued by one of the defendants as manager of the project. One of the

defendants himself actually prepared the accounting reports which were charged as forfeitures.

In United States v. Grannis, 172 F. 2d 507 (C.A. 4th 1949), cert. denied, 337 U. S. 918 (1949) there were 130 separate shipments accompanied by vouchers with annexed schedules containing false statements as to ownership and valuation. The government argued that each of the 130 shipments should constitute a separate $2,000.00 forfeiture in addition to 10 forfeitures for each of 10 false vouchers submitted for payment by the defendants themselves (172 F. 2d at 515, 516). The court expressly denied this contention and limited the number of forfeitures to the 10 false vouchers which were actually submitted by the defendants themselves. It relied in this

decision on the Hess and Rohleder cases, supra.

In United States v. Collyer Insulated Wire Co., 94 F. Supp. 493 (D.R.I. 1950) the defendants were charged with forfeitures for 105 separate false claims, each of which were submitted by the defendants themselves who were the direct contractors with the government. They were not charged with false claims based upon an arbitrary break-down of invoices or vouchers made by someone else.

Perhaps even more significant is United States vs. Toepelman 141 F. Supp. 677 (E.D.N.C. 1956). There the defendant was charged with 82 forfeitures based on 82 fraudulent notes which were submitted under only 14 letters of transmittal by the bank which was the intermediary between defendant and the Government. Thus the Court held that the

defendant was chargeable, not on the basis of acts committed by an intermediary, but on the basis of acts committed by himself, each of which resulted directly in payment to himself.

Finally, we call the Court's attention to Judge Feinberg's decision in United States v. Greenberg, 237 F. Supp. 439 443, 445 (S.D.N.Y. 1965) as exemplifying the proper approach to this case. There the Court noted that the defendant himself filed the vouchers upon which the payments were made to him. The government took the position that the number of forfeitures was within the discretion of the Court. The Court held that although there were 34 false payroll reports filed by the defendant with the United States together with 34 false affidavits, the number of forfeitures should be limited to 3, one for each of the contracts involved. There the Court

took account of the fact that the defendant had already been convicted in a criminal prosecution, as have the defendants in the case at bar. It also took account of the fact that the government had not proved any actual out-of-pocket damages.

The Court's analysis of the law on the basis of which it limited the number of forfeitures is significant: (237 F. Supp. at 442).

> "Not all false statements made to the federal government are claims within the meaning of the False Claims Act. E. g. United States v. Howell, 318 F. 2d 162 (9th Cir. 1963). In United States v. McNinch, 356 U. S. 595, 78 S. Ct. 950, 2 L . Ed 2d 1001 (1958), the Supreme Court held that the mere submission of a false application to a credit institution which, in turn, procured F.H.A. insurance of the loan did not constitute a false claim against the government. The Court stated: '(T)he conception of a claim against the government normally connotes a demand for money or for some transfer of public property.' Id. at 599, 78 S. Ct. at 952".

So here, neither the false markings on the tubes or on the packing slips nor the false certifications constituted claims within the meaning of the False Claims Act, as the Court below properly held contrary to the government's claim. See also United States v. McNinch, 356 U. S. 595 (1958); United States v. Tieger, 234 F. 2d 589 (C.A. 3d, 1956), cert. denied, 352 U. S. 941 (1956); United States v. American Precision Products Corp., 115 F. Supp. 823 (D.N.J. 1953).

As the Court put it in United States v. Cochran, 235 F. 2d 131, 134 (C.A. 5th, 1956):

> "Every word and line of this statute breathes the purpose to deal, it has the effect of dealing, only with the acts of persons falsely claiming money or property in the circumstances and with the effect dealt with in the statute. The statute does not deal with or denounce fraud in general. It cannot be read as doing so".

The government here seeks to charge

defendants with a multiplicity of forfeitures based on a concept of "fraud in general". Under Cochran, it must be limited to acts of defendants themselves falsely claiming money or property.

II

UNDER THE FALSE CLAIMS ACT, DAMAGES ARE PROPERLY ASSESSED BY FIRST GIVING A CREDIT TO RESPONDENTS-SUBCONTRACTORS FOR THE RECOVERY MADE BY THE UNITED STATES FROM THE PRIME CONTRACTOR WITH RESPECT TO THE BASIC DAMAGE CLAIM

The essence of the government's case on this issue, as well as the forfeiture question, is that the double damages granted by both courts below is not sufficient to act as a deterrent. The answering arguments above apply equally here.

The case of United States v. Klein, 230 F. Supp. 426, (W.D. Pa. 1964), affirmed per curiam, 356 F. 2d 983 (3rd Cir., 1966), applies herein. The govern-

ment has chosen to ignore this significant decision in its brief. The pertinent Klein rationale reads as follows:

> "The defendant, however, contests the right of the plaintiff to receive damages with the allowance of credits due from the doubled damages. The question her is to whether credits are allowable from single damages or double damages. Certain credit amounts were received by the plaintiff after foreclosures of the properties. The Government urges that damages should be first doubled and that allowable credits should be deducted from the double damages. The defendant disagrees. The Act provides that in addition to the $2,000 forfeiture, the plaintiff is to be allowed double the amount of damages which it may have sustained. The Act does not indicate when damages are to be doubled, it merely provides for double the amount of damages, and this reasonably appears to be such as are finally determined."
>
> "Accordingly, the credit should be first deducted from the single damages as finally determined and the remainder doubled for the purpose of determining the amount of damages to which the plaintiff was entitled." (Underlining added)

Both courts below rejected totally Petitioner's claims of double damages. (Pet. App. C, pp. 30A-35A; Pet. App. A, pp. 5A-8A).

Again, with respect to the double damage claim, the Petitioner has altered its position from that which it took in the courts below. It seems to have discarded the concept that the $18,000.00 Model payment was made from a "collateral source".

Nevertheless, it does cite again the case of United States v. Globe Remodelling Co., 196 F. Supp. 652 (D. Vt.,1961) (decided before United States v. Klein Supra.) as supporting its contention that repayments by a third party are to be subtracted after doubling the original losses. However, in Globe the sources making the payment were truly collateral to the defendants against whom damages were sought. The defendants had aided in

procuring Federal Housing Administration insured loans to others by means of false statements. However, the actual borrowers made the payment in question. Clearly, these borrowers who actually received the money in the first place would have no claim over and against the defendants who aided them in procuring the loans by making false statements.

In the case at bar however, Model's loss, for which it repaid the government, is directly attributable to defendants and Model had a claim over and against the defendants. Clearly, Model is not a "collateral source" as were the defendants in the other case cited by plaintiff.

CONCLUSION

The judgment of the court of appeals should be affirmed and a judgment entered with respect to double damages in

the amount of $79.40, as well as a judgment with respect to the awarding of a single forfeiture in the amount of $2,000.00.

Respondent Philip L. Bornstein requests, in the alternative with respect to the question of forfeiture, that a judgment be entered not to exceed $6,000.00 which would reflect the commission by said respondent of no more than three acts herein.

Respectfully submitted.

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June, 1975.